

File

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of Village of Cleveland for)	
a Permit to Abandon the Centerville Dam)	
on Centerville Creek, Village of)	Case No. 3-LM-93-340
Cleveland, Manitowoc County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, PERMIT AND ORDER

Pursuant to due notice, including publication, hearing was held on January 5, 1995, at Manitowoc, Wisconsin, Jeffrey D. Boldt, Administrative Law Judge (the ALJ), presiding. Pursuant to sec. 31.185(4), Stats., the ALJ deferred issuing this Order for 120 days after the hearing to allow an opportunity for any eligible parties to attempt to acquire ownership of the dam. No such persons came forward during the statutory period.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Department of Natural Resources, by

Milton Donald, Attorney
P. O. Box 7921
Madison, WI 53703-7921

Village of Cleveland, by

Larry Nichols, Village Trustee
1391 Lakeshore Road
Cleveland, WI 53015

Christopher M. Kuehnel, Personally and
Representing Save the Dam Foundation
1032 Beech Street
Cleveland, WI 53015

FINDINGS OF FACT

1. On May 28, 1993, the Village of Cleveland, c/o Gary C. Schmitz, Village President, applied to the Department of Natural Resources for a permit to remove the

Centerville dam (the dam) on Centerville Creek within the Village of Cleveland. The dam is located in the SE 1/4 of the NE 1/4 of Section 27, Township 17 North, Range 23 East, Village of Cleveland, Manitowoc County, Wisconsin.

2. The Department of Natural Resources issued a Notice which stated that unless written objection was made within thirty days after publication, the Department might issue a decision on the permit without a hearing. Timely objections were filed to the Department opposing the permit application.

Publication of the Notice of Proposed Permit was made in the Sheboygan Press on July 15, 1993. (Ex 21) Notice of the first proposed date of public hearing was published on September 9, 1994, in the Herald Times Reporter. (Ex 22) An Amended Notice of Public Hearing giving the public notice of the amended January 5, 1995 hearing date was published on October 24, 1994, also in the Manitowoc Herald Times Reporter.

Given these facts, the applicant and the Department have complied with all relevant procedural requirements of sec. 31.185, Stats., including compliance with sec. 31.06.

3. The Centerville dam is located on the east side of the Village of Cleveland within 1000 feet of Lake Michigan. The parties do not dispute that Centerville Creek is navigable-in-fact at the project site. The dam consists of a concrete structure with several fixed-crest spillways, a draw down pipe, an abandoned flume pipe, and eroding earthen embankments. (See Ex 7)

The dam has been at its present location for many years. Exhibit 15 indicates a conveyance of the "so-called mill property", including a "mill dam" on December 5, 1895. Solely on the basis of this document, Mr. Kuehnle argues that the dam is a mill dam and therefore exempt from the provisions of sec. 31.187, Stats. On this record, the ALJ finds an insufficient basis to reach such a conclusion, and finds that the provisions of Ch. 31 govern this application. There is evidence that the current concrete structure at the site was constructed in 1935. (Ex. 10) Further, on its face sec. 31.185, Stats. does not exempt mill dams, but grants the Department authority to require a permit to abandon "any dam".

4. An inspection of the dam was performed by Department Dam Safety staff on January 29, 1988. The inspection concluded that there were numerous deficiencies effecting dam safety, including concrete deterioration of the construction joints and walkway, embankment erosion and no dam warning sign.

5. On October 5, 1992, the Department issued an order for Impoundment Draw down, Dam Reconstruction or Abandonment (the 1992 Order). Repairs to the dam were undertaken in September of 1992. These repairs revealed that deficiencies on the dam were even more extensive than had been described in the 1988 inspection. Extensive concrete

deterioration was evident, as were voids under the apron and a lack of concrete reinforcement.

The October 5, 1992 Order concluded that: "The dam in its present condition, is not sufficiently strong, is unsafe and dangerous to life, health and property."

6. The 1992 Order required a draw down of the impoundment, which was accomplished in October of 1992. The Village was required to engage the services of a professional engineer to complete needed dam repairs or to submit a request to abandon the dam pursuant to sec. 31.185, Stats., by June 1, 1993. On May 28, 1992, the Village filed the Application For A Permit To Abandon A Dam that is the subject of this action.

7. The Department has made an environmental assessment of the proposed abandonment and determined that the grant or denial of the proposed permit would not constitute a major state action significantly affecting the quality of the human environment.

8. The proposed abandonment will not adversely affect water quality nor increase water pollution in Centerville Creek nor cause environmental pollution as defined in subsec. 144.30(9), Stats., upon compliance with the conditions of the Order.

9. The proposed abandonment will not adversely affect public rights in navigable waters and will not endanger life, health and property upon compliance with the conditions in the Order. Numerous persons oppose the abandonment of the dam, but no municipalities, persons or organization have indicated a willingness to acquire ownership of the dam and complete all necessary repairs.

10. Development may take place in the future along the stream. The removal and abandonment should be made in such a way that flood flows are not materially obstructed and no flood damage potential is created.

11. The Department has made an investigation of the dam. On the basis of such investigation, the following actions are deemed necessary as part of the process of abandonment of the dam to preserve public rights in navigable waters, to promote safety, and to protect life, health and property:

- a. Village of Cleveland shall submit final dam removal and restoration plans to the Department for approval. The plans shall include all temporary or construction roads, cofferdams, erosion control measures, or other temporary or permanent structures required for the removal project.
- b. Prior to removal, a portion of the concrete dam must be breached at least to elevation 81.0 (based on the datum in the original plans). All newly exposed

sediment should be promptly graded as necessary and seeded (assuming seasonal conditions will allow germination).

- c. All concrete, earth, wood and steel portions of the dam shall be removed completely to native soil or bedrock, including spillway, walks, fences, abutments, gates, penstock pipe section and earth berms.
- d. Existing retaining walls on shorelines in the former impoundment may remain if they will be structurally stable under the new conditions.
- e. Steel from gates, walks and spillways shall be salvaged for recycling and removed from the site.
- f. Concrete and soil shall be placed in an approved disposal area. No broken concrete shall be used as riprap.
- g. The exposed pond sediment at the upstream face of the dam shall be graded back at a minimum slope of 6:1. Silt fence shall be placed at the toe of the sediment until stabilized by vegetation.
- h. All exposed banks at the dam removal site shall be stabilized with riprap over filter fabric.
- i. Erosion control measures and sedimentation protection techniques shall be employed throughout the project area to ensure that any disturbed areas are stabilized and protected from erosion. The project must at all times meet the minimum protection standards described in the "Wisconsin Construction Site Best Management Practice Handbook", DNR publication WR-222-89. The erosion control plan must be approved by the Lake Michigan District Office prior to the start of construction.
- j. The Village of Cleveland may be required to obtain a section 404 permit from the Army Corps of Engineers, St. Paul District.

DISCUSSION

Mr. Chris Kuehnel appeared at hearing objecting to the Village request to abandon the dam. In addition to the procedural and legal arguments noted above, Kuehnel described his efforts to put together a group to acquire ownership of the dam. Prior to issuing this decision, the ALJ allowed Kuehnel the 120 day period required by sec. 31.185(4), Stats., to provide evidence that such a group had agreed to acquire ownership of the dam. No such evidence was submitted.

Kuehnel conceded at hearing that he had no specialized knowledge on environmental issues, nor did he provide any other expert opinions disputing the DNR position that there would be no significant adverse environmental consequences as a result of abandonment of the dam.

All of the conditions proposed by the Department are reasonably necessary to preserve public rights in navigable waters, to promote safety, and/or to protect life, health and property.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority pursuant to sec. 227.43 and sec. 31.185, Stats., to hear contested cases and enter necessary orders relating to permits to abandon dams. Hearing in this matter was held on January 5, 1995 and the Administrative Law Judge deferred issuing the Order until after May 5, 1995, to allow a period of 120 days for any municipality or other persons or associations an opportunity to acquire ownership of the dam. Section 31.185(4), Stats. No such municipality, persons, or organization have made themselves known to the ALJ.

2. The Department has authority under sec. 31.185, Stats., and in accordance with the forgoing Findings of Fact, to grant a permit to abandon the Centerville Dam as herein described, subject to the conditions contained in the order.

3. The Department has complied with the procedural requirements of sec. 1.11, Stats.

PERMIT

AND HEREBY THERE DOES ISSUE AND IS GRANTED to the applicant, the Village of Cleveland, a permit to abandon the Centerville Dam on Centerville Creek, Village of Cleveland.

ORDER

THE DIVISION THEREFORE ORDERS:

1. The permittee shall, by July 21, 1995, submit plans for abandonment of the dam and restoration of the dam site for approval by the Department.

2. No work or removal shall commence until the plans have been approved by the Department.

3. Work shall be accomplished in accordance with the recommendations of Department staff contained in Findings of Fact Number 11.

4. The waterway for flow and navigation in the vicinity of the structure shall be restored as nearly as practicable to its condition prior to the original construction of the dam.

5. The applicant shall notify the Lake Michigan District, Green Bay Area Office, in writing not less than 10 days prior to commencing the abandonment and again not more than 10 days after completion.

Dated at Madison, Wisconsin on May 10, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By



JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.